

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 62247-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
DEMICKO BILLIE THOMAS,)	
)	
Appellant.)	FILED: August 2, 2010
)	

APPELWICK, J. — Thomas appeals his sentence, claiming that the trial court failed to conduct a proper colloquy before allowing him to waive his constitutional right to an attorney and proceed pro se. He also contends that his multiple firearm enhancements violate double jeopardy and must also be reversed based on erroneous statutory citations in the information. Because Thomas fails to demonstrate any reversible error, we affirm.

FACTS

In June 2004, a jury found Demicko Thomas guilty of first degree robbery, attempted first degree robbery, three counts of first degree kidnapping, first degree assault, and unlawful possession of a firearm. The jury found that Thomas committed the first six crimes while armed with a firearm. In 2005, the trial court imposed a standard range sentence and firearm enhancements for a

total of 800 months incarceration. On appeal, this court accepted the State's concession that Thomas should have received a 36-month firearm enhancement for the attempted robbery rather than a 60-month enhancement and remanded for resentencing. State v. Thomas, noted at 139 Wn. App. 1065, 2007 WL 2084187, review denied, 163 Wn.2d 1027, 185 P.3d 1196 (2008).

At a hearing for resentencing on August 19, 2008, the following occurred:

THE COURT: Good afternoon, Mr. Thomas.

MR. THOMAS: Hello, your Honor.

THE COURT: Mr. Thomas, how do you wish to proceed at this time?

MR. THOMAS: As requested, pro se, sir.

THE COURT: Do you have any objection to having Mr. Todd assist you as standby counsel in the event that you have questions that you want to ask him?

MR. THOMAS: No, sir.

THE COURT: All right. That will be how we proceed.

I have found previously that Mr. Thomas is competent to be able to represent himself. I reviewed the pleadings that he has submitted. They are extensive in this matter. I think that probably Mr. Thomas is more uniquely qualified to represent himself than the vast majority of people who request that they be able to proceed pro se, so I will find that Mr. Thomas understands the issues and is competent to proceed, but I also would ask Mr. Todd as standby counsel to be able to confer with him.

And, Mr. Thomas, Mr. Todd is someone who has appeared before me, you have seen him here, he has been with you in the past, but he has been here in front of me for a number of years. I find him to be extremely knowledgeable and competent, and I would encourage you to utilize his services to ask him questions, to hear what he has to say, to understand what -- the legal ramifications, the arguments may be based upon his understanding of the law, and to supplement your extensive understanding and

briefing. Any problem with that, sir?

MR. THOMAS: No, your Honor.

THE COURT: Mr. Todd, any problem with that?

MR. TODD: No, your Honor, that's fine.

THE COURT: And, Mr. Scarr, any problem with that?

MR. SCARR: No, your Honor.

THE COURT: All right. We'll proceed accordingly.

After the prosecutor described the State's sentencing recommendation, Thomas requested a continuance, because he had not been properly served with the State's presentence report. The trial court continued the hearing.

On August 25, 2008, after the State repeated its sentencing recommendation, the trial court stated,

Mr. Thomas, Mr. Todd, the record should reflect that Mr. Brian Todd is here as standby counsel. Mr. Thomas has -- decided last week he is capable and competent to represent himself. He has done it on and off for a number of hearings and in a number of court proceedings. Mr. Thomas and I had the colloquy last week, I don't think I need to repeat it. Mr. Todd is there to provide assistance.

After hearing from the State and Thomas, the trial court imposed a standard range sentence and six consecutive firearm enhancements for a total of 726 months of incarceration. Thomas appeals.

ANALYSIS

I. Right to Counsel

Thomas first contends that the trial court violated his right to counsel by failing to conduct a sufficient colloquy regarding his request to proceed pro se at his resentencing hearing in August 2008. A defendant has a constitutional right

to proceed without counsel as long as his constitutional right to counsel is knowingly, voluntarily, and intelligently waived. Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); City of Bellevue v. Acrey, 103 Wn.2d 203, 208–09, 691 P.2d 957 (1984). The preferred method for determining the validity of a waiver of the right to counsel is “a court’s colloquy with the accused on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the accused’s defense.” State v. Silva, 108 Wn. App. 536, 539, 91 P.3d 729 (2001).

To protect defendants from making capricious waivers of counsel, and to protect trial courts from manipulative vacillations by defendants regarding representation, we require a defendant’s request to proceed *in propria persona*, or pro se, to be unequivocal. Once an unequivocal waiver of counsel has been made, the defendant may not later demand the assistance of counsel as a matter of right since reappointment is wholly within the discretion of the trial court.

State v. DeWeese, 117 Wn.2d 369, 376–77, 816 P.2d 1 (1991). The pro se defendant has no absolute right to standby counsel. Id. at 379 (citing Locks v. Sumner, 703 F.2d 403, 407 (9th Cir. 1983)). “Moreover, there is no Sixth Amendment right to ‘hybrid representation’ through which defendants may serve as cocounsel with their attorneys.” Id. (citing State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987)).

The record demonstrates that the trial court properly accepted Thomas’s valid waiver of his constitutional right to counsel in this case. The trial court conducted a lengthy colloquy with Thomas on his motion to proceed pro se prior to trial at a hearing on November 14, 2003. The trial court cautioned Thomas,

“You should not represent yourself”; “[T]his is not a game”; “I want you to understand, sir, it’s a big risk”; “You will not be given a break just because you have chosen to represent yourself”; “[Y]ou may lose just because you don’t know what you are doing”; “You have a very, very serious trial”; and “[Y]ou will have a better chance at the trial with [defense counsel], no doubt in my mind.”

After the trial court questioned Thomas about the potential prison time he was facing if convicted, the prosecutor stated, “[T]he maximum sentence for the defendant is life in prison and a \$50,000 fine” on each of seven charges and “ten years and \$20,000” on the eighth charge; “So it’s actually more than 30 at this point as he was initially charged. He was armed. 25 to 30 years. There has been an amendment.” The trial court stated, “Understand that the Court may very well decide to send you to jail for life,” and “[Y]ou are risking life in prison.”

The trial court asked Thomas whether he had a copy of the court rules and warned Thomas that he would not be able to learn the rules or make up for the experience of appointed counsel in the time before trial. The trial court advised Thomas that he would be “required to follow all the rules of evidence, to know the law and do everything that is necessary. Even attorneys who have been practicing a very long time don’t do that well and they are not facing the kind of penalty that you are facing if you lose this case.” The trial court continued:

The fact that you choose to represent yourself pro se, the fact that you may not do a good job, the fact that you may miss evidentiary rule issues that an attorney would catch, that’s not going to be grounds for an appeal. If you choose to represent yourself, you take the risk of that and you can’t then go up to the Court of

Appeals and say I made a mistake, I shouldn't have represented myself. I didn't realize. I didn't know what I was doing. You must be prepared to be held to the standard. Do you understand that?

The trial court also asked Thomas whether he had planned his defense, how he intended to prepare for trial while in jail, and whether he understood certain court orders. After Thomas rejected the trial court's offer to allow him more time to consult with defense counsel rather than waive his right to counsel, the trial court concluded the extensive questioning as follows:

Because you are not a lawyer, because you don't understand the law, because you don't understand the rules of evidence; and quite frankly, sir, though you are very intelligent you also do not have enough command of the English language in front of 12 people that will decide your fate. Do you still want to represent yourself?

Throughout the colloquy, Thomas repeatedly stated that he wished to represent himself and that he understood all of the trial court's warnings. Under these circumstances, Thomas made an unequivocal request to proceed pro se and the trial court's colloquy properly ensured the validity of his waiver of his right to counsel in this matter before allowing him to proceed pro se.

Without citation to authority, Thomas now claims that he did not waive his right to counsel "in perpetuity" and points to his reliance on standby counsel during trial and the fact that he was represented by counsel on appeal. But after a valid waiver of counsel,

[T]he trial court is not obliged to appoint, or reappoint, counsel on the demand of the defendant. The matter is wholly within the trial court's discretion. Self-representation is a grave undertaking, one not to be encouraged. Its consequences, which often work to the defendant's detriment, must nevertheless be borne by the defendant.

DeWeese, 117 Wn.2d at 379.

Thomas asked to proceed pro se at the resentencing hearing in August 2008. Nothing in the record indicates that Thomas was unaware of, had forgotten, or had questions about the trial court's comments prior to trial in 2003 regarding the seriousness of the charges, the possible maximum penalty involved, the existence of the applicable rules, or about his valid waiver of his right to counsel. Under these circumstances, the trial court did not abuse its discretion by allowing Thomas to continue pro se, with standby counsel, without conducting an additional complete colloquy as if he had not previously waived his right to counsel in this case. See, e.g., DeWeese, 117 Wn.2d at 378-79 (after defendant's valid waiver of right to counsel, trial court did not abuse its discretion by refusing defendant's demand for new standby counsel).

II. Firearm Enhancements

Thomas argues that the sentencing court erred in imposing multiple enhancements for the same criminal conduct. But as the Washington Supreme Court held in State v. Mandanas, 168 Wn.2d 84, 88, 228 P.3d 13 (2010), sentencing courts are statutorily required to impose multiple enhancements where a defendant is convicted of multiple enhancement-eligible offenses that constitute the same criminal conduct.

Thomas also claims that the imposition of multiple firearm enhancements based on a single incident involving a single firearm violates double jeopardy. Washington courts have repeatedly rejected such claims. State v. Kelley, 168 Wn.2d 72, 83, 226 P.3d 773 (2010) (double jeopardy is not violated where legislature intended "cumulative punishments may be imposed for the same act

or conduct in the same proceeding”); State v. Aguirre, 168 Wn.2d 350, 366–67, 229 P.3d 669 (2010) (double jeopardy not offended by weapon enhancements even when being armed with weapon is element of underlying crime). See also State v. Nguyen, 134 Wn. App. 863, 866–68, 142 P.3d 1117 (2006) (rejecting double jeopardy challenge to multiple firearm enhancements totaling 492 months where certain of the multiple convictions constituted same criminal conduct and sentencing court imposed a standard range sentence of 135 months) (cited with approval in Kelley, 168 Wn.2d at 81), review denied, 163 Wn.2d 1053, 187 P.3d 752 (2008); State v. Ward, 125 Wn. App. 243, 251–52, 104 P.3d 670 (2004) (no double jeopardy violation in two consecutive firearm enhancements based on use of single gun in two assaults during one incident); State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (no double jeopardy violation in two weapon enhancements following convictions of first degree burglary and first degree rape in a single incident while armed with a single knife, because enhancement statute “unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there are two offenses eligible for an enhancement”).

III. Information Error

Thomas claims that he was denied due process and the firearm enhancements must be reversed, because the information cited an inapplicable former statute.¹ In particular, the information charged that during the

¹ While this attack on the conviction would be more appropriate in a personal restraint petition rather than in this appeal of the resentencing, Thomas first raised the issue at the resentencing hearing and the State does not object to our

commission of each relevant count, Thomas was “armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3).” But, before the dates Thomas was alleged to have committed his offenses, the Legislature had recodified the firearm enhancement, such that the correct statute was former RCW 9.94A.510 (2001).

A charging document must apprise the accused of the charges against him and allow him to prepare a defense, but “[e]rror in a numerical statutory citation is not reversible error unless it prejudice[s] the accused.” State v. Vangerpen, 125 Wn.2d 782, 787–88, 888 P.2d 1177 (1995). CrR 2.1(a)(1) provides in pertinent part: “Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant’s prejudice.”

Relying on State v. Bisson, 156 Wn.2d 507, 130 P.3d 820 (2006), Thomas claims that because a former RCW 9.94A.310(3) (1996) allowed courts to impose multiple weapon enhancements to run concurrently, he was misled by the citation in the information to believe that he could receive concurrent firearm enhancements. See In re Post Sentencing Review of Charles, 135 Wn.2d 239, 253, 955 P.2d 798 (1998) (superseded by Laws of 1998, ch. 235, § 1). But, in Bisson, the State conceded that the defendant’s guilty plea was involuntary, because the plea paperwork did not clearly indicate that multiple weapons enhancements would be imposed consecutively and nothing in the record

addressing it here.

indicated that the defendant had been so informed. Bisson, 156 Wn.2d at 514–16. Because Thomas did not plead guilty, Bisson is inapposite.

Here, Thomas fails to demonstrate that he was prejudiced by the citation error. The information clearly indicates that the State intended to prove at trial that Thomas was armed with a firearm during the commission of seven of the eight crimes charged. Thomas does not argue or establish that the incorrect citation affected his ability to prepare an adequate defense to that accusation. See State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991) (primary goal of rule requiring information to contain essential elements of the charge is to give accused notice of nature of accusations against him so that he can prepare an adequate defense).

Thomas appears to argue that he was prejudiced by the improper citation because he did not know the potential maximum sentence he faced when he decided to go to trial. But Thomas fails to provide any relevant Washington authority requiring the State to include the maximum potential sentence in the charging document or determine whether a defendant understands the maximum potential sentence before he exercises his constitutional right to a jury trial.

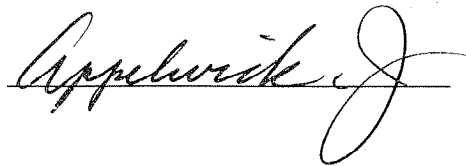
IV. Statement of Additional Grounds for Review

In his statement of additional grounds for review, Thomas includes additional arguments to support his claim that the firearm enhancements imposed in his sentence violate double jeopardy. Given the authority holding to the contrary listed above, we need not further address these arguments.

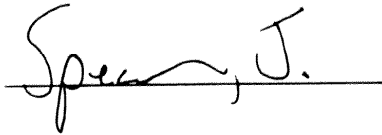
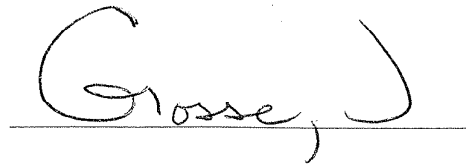
Thomas next argues that the definition of “firearm” contained in Former

RCW 9.41.010(1) (2001)² is unconstitutionally vague. Because this challenge to the conviction was not raised at the resentencing hearing, it is beyond the scope of this appeal and we decline to address it.

Affirmed.

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WE CONCUR:

A handwritten signature in cursive script, reading "Spear, J.", written over a horizontal line.A handwritten signature in cursive script, reading "Grosse, J.", written over a horizontal line.

² The section was recodified with alphabetized definitions in 2009. See Laws of 2009, ch. 216, § 1.